

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOSEPH D. FARMER

Claimant

V.

WESTERN ENGINEERING CO., INC.

Respondent

AND

**GENERAL CASUALTY COMPANY
OF WISCONSIN**

Docket No. 236,087

ORDER

Claimant, by and through William Phalen, of Pittsburg, requested review of Administrative Law Judge Kenneth J. Hursh's April 7, 2015 Post-Award Medical Award. Ryan Weltz, of Overland Park, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record. This is the third post-award proceeding before the Board. The record consists of the transcript and deposition listed in the underlying Post-Award Medical Award and the records listed in the judge's May 18, 2011 Post Medical Award and the June 30, 2010 Post Medical Award. No stipulations were taken.

ISSUES

Claimant alleges he sustained a left humerus fracture at the time of his 1996 work accident. He requests an MRI and/or evaluation by an orthopedic surgeon, as recommended by the authorized treating physician, R. David Parris, M.D.

The judge denied claimant's requests after finding he failed to prove his left humerus fracture and left shoulder injury arose from his 1996 work accident. The judge stated it was highly unlikely a work-related fracture of claimant's upper arm bone would go unmentioned by claimant and physicians for 18 years.

Claimant requests reversal. He argues Dr. Parris provided an uncontroverted opinion that claimant's need for MRI testing is the natural flow and progression of his 1996 work injury. Claimant contends without an MRI, the doctor cannot provide appropriate care for claimant's work injury. Claimant asserts the judge improperly speculated his injury was caused apart from his work injury or the direct and natural result thereof.

Respondent maintains the Award should be affirmed. Respondent contends there is no credible evidence showing claimant's left upper extremity complaints are related to the accident. Respondent argues claimant's current allegations were absent from the record for the 18 years after his 1996 accidental injury.

The issue for review is: Are claimant's left shoulder and left humeral fracture injuries due to or the result of his 1996 work-related accidental injury, either from the initial accident or as a direct and natural result thereof?

FINDINGS OF FACT

On December 9, 1996, claimant was working as a flagman on a highway construction crew when he was struck by a car traveling around 65 miles an hour. He sustained serious and widespread injuries. Claimant's application for hearing listed various injuries, including, "Multiple trauma—general body disability, including fractured right and left tibia/fibula, fractured jaw, fractured left index finger, fractured right humerus, facial lacerations, broken teeth."

According to the August 18, 1998 report of Edward J. Prostic, M.D., claimant's retained medical expert, claimant sustained multiple injuries including a concussion, chin laceration, left lower leg laceration, right tibial and fibula fractures, left tibia fracture, right shoulder fracture, left index finger fracture and mandible fracture. Dr. Prostic's report did not mention claimant having a left upper arm or left shoulder injury. Dr. Prostic's report noted claimant had a previous bicycle accident resulting in a left wrist injury, splenectomy and head injury.

A preliminary hearing was held on March 1, 1999. Claimant testified that among his various and widespread injuries, he injured his right shoulder in the accident. He did not mention injuring his left upper arm or shoulder.

In April 2000, the parties settled this matter with claimant reserving the right to request additional medical treatment. Respondent authorized Dr. Parris, a board certified family physician, who treated claimant since 1997 and has practiced medicine since 1981, to provide ongoing medical treatment for claimant, which consisted primarily of monitoring medications.

Dr. Parris' February 2006 records show claimant had neck and posterior left shoulder pain, or a latissimus dorsi trigger point area, for which he had two trigger point injections. Claimant had a cervical spine x-ray for neck pain, left shoulder pain and left arm radiculopathy. The x-ray showed mild degenerative changes to claimant's cervical spine. Dr. Parris' May 24, 2006 record stated claimant had a left posterior shoulder strain after pulling on Jobst stockings and noted claimant's report that he felt a tearing sensation in his suprascapular area.

On September 16, 2009, Eden Wheeler, M.D., who is board-certified in physical medicine and rehabilitation, examined claimant at respondent's request. Dr. Wheeler reviewed some, but not all, of claimant's records. Claimant did not complain to her about his left shoulder or left upper arm. Dr. Wheeler made several diagnoses, none of which included claimant's upper left arm or left shoulder. Dr. Wheeler's report noted claimant had a motorcycle accident in 1981 requiring a splenectomy, but without fractures or surgeries based on claimant's recollection. The doctor noted claimant had complained about his left shoulder in 2006 and 2007. She reviewed 2006 left shoulder and left humerus radiology reports from KU Medical Center (KUMC). According to Dr. Wheeler's summation of records, the latter study showed a stable humeral fracture. Dr. Wheeler did not causally relate claimant's neck and left shoulder complaints to his 1996 accident.

Dr. Parris' January 6, 2010 record noted claimant had subjective paresthesias in his upper arms. In 2010, Dr. Parris recommended claimant see an orthopedic specialist at KUMC for *right* shoulder and neck complaints, which respondent denied. The dispute proceeded to a February 9, 2010 post-award hearing. When asked about the inclusive scope of his injuries, claimant included injuring his right shoulder in the 1996 accident, but he did not mention injuring his left shoulder. Respondent's counsel asked claimant about seeing Christopher Glattes, M.D., for his neck and left shoulder and claimant stated he saw Dr. Glattes for his right shoulder, not his left shoulder. He also testified he saw Dr. Glattes for neck and left shoulder pain after putting on compression stockings necessitated by his leg injuries.

Dr. Prostic examined claimant a second time on March 3, 2010. Claimant complained about "difficulty with his neck and both arms."¹ He reported neck pain radiating into his left trapezius after pulling on compression stockings. Dr. Prostic testified claimant's left upper extremity symptoms were likely caused by pain radiating from his cervical spine. Dr. Prostic did not mention a left upper arm or humerus fracture or a left shoulder injury.

On June 30, 2010, the judge determined claimant's neck and right shoulder complaints were caused by the 1996 accidental injury. The judge ordered respondent to continue to provide claimant all treatment and evaluations recommended by Dr. Parris for conditions Dr. Parris related to the work injury. The Board affirmed the ruling.

Despite the judge's prior order, respondent sent claimant to Steven Hendler, M.D., on November 30, 2010, for continued treatment. Dr. Hendler did not diagnose claimant with a left upper arm or left shoulder condition. Respondent interpreted the judge's initial Post Medical Award to require that it provide the medical treatment recommended by Dr. Parris, but not that Dr. Parris was designated to remain the authorized treating physician. Claimant requested a change of physician back to Dr. Parris. Consequently, a second-post award proceeding was held. Among other things, the judge ordered respondent to provide authorized medical treatment with Dr. Parris. The Board affirmed the ruling.

¹ Prostic Depo., Ex. 2 at 1.

Dr. Parris testified on December 19, 2013, that claimant is basically a “total body pain person,” including his right arm and shoulder.² Dr. Parris did not specify that claimant had a left shoulder or left upper arm condition.

Claimant testified in the instant post-award hearing on September 17, 2014, detailing his 1996 work injuries to include a left arm fracture which doctors at KUMC left to heal on its own. He testified that he had right shoulder surgery and began using his left arm more than his right. Claimant testified he has “always” had pain and discomfort in his left upper extremity, from the time of his accidental injury forward.³ Claimant testified he developed increased pain in his left shoulder with decreased range of motion in spring 2014. He denied having done anything to reinjure his left arm. He was asked if he had any other left arm treatment after his 1996 accident other than having his left arm “set in the hospital” and replied in the negative.⁴

On July 23, 2014, claimant saw Dr. Parris and complained of increasing left shoulder pain and immobility. Claimant, by history, related his left upper arm injury to his 1996 accident. Dr. Parris ordered an x-ray which showed a healed old fracture of the proximal humeral shaft, about one inch below the top of the shoulder, and no acute new injuries. Dr. Parris diagnosed claimant with rotator cuff pain, decreased range of motion and a previous humerus fracture. Dr. Parris recommended a left shoulder MRI and/or a referral to an orthopedic surgeon for evaluation.

After receiving Dr. Parris’ recommendation for a left shoulder MRI, respondent’s counsel asked Dr. Parris to explain how claimant’s left shoulder was involved in the 1996 accident. Dr. Parris sent respondent’s counsel a copy of a December 26, 1996 x-ray report regarding claimant’s *right* scapula.

Claimant returned to Dr. Parris on November 26, 2014, with complaints of neck and left shoulder pain, in addition to numbness and tingling in his left hand. Dr. Parris ordered a repeat x-ray on claimant’s shoulder and humerus. The x-ray was unchanged from the July 2014 report. Dr. Parris injected claimant’s left shoulder with steroid and refilled his pain medication.

Dr. Parris testified again on January 15, 2015, stating it would take significant force to fracture the humerus because it is a very strong and heavy bone. Dr. Parris indicated physicians usually treat a humerus fracture by letting gravity bring it down, especially when the individual has multiple other fractures.

² Parris Depo. (Dec. 19, 2013) at 18.

³ P.A.H. (Sept. 17, 2014) at 7; see also p. 8.

⁴ *Id.* at 12-13. There does not appear to be evidence claimant’s left arm was ever “set in the hospital.”

Dr. Parris opined claimant's left shoulder humerus fracture was consistent with the mechanism of the 1996 injury and testified he could not arrive at a "definitive diagnosis" without an MRI.⁵ The doctor was concerned claimant had more than a left humerus fracture, perhaps a rotator cuff injury. Dr. Parris testified claimant's humerus fracture and his need for an MRI was the "natural flow and progression" of his 1996 work accident.⁶

Dr. Parris indicated that when his office sent respondent's counsel a copy of the 1996 right scapula x-ray report, he actually intended to send respondent's counsel documentation showing claimant's left shoulder area was injured in the 1996 accident. Dr. Parris did not know if any such record showing claimant initially had a left shoulder injury actually existed. Dr. Parris acknowledged he is unable to date the humerus fracture to claimant's left shoulder by looking at the x-ray reports. Regarding causation, he testified:

Q. And you are able to attribute [the humerus fracture] to the work accident how?

A. . . . All I can say is that Mr. Farmer said that his shoulder was also injured in the accident and he continued to have pain and showed evidence of an old healed fracture and I believe since he has not had any other trauma since that time, that it was related because of that.

Q. Had he been reporting those type of symptoms to you over the course of the time you have been serving as his authorized treating physician?

A. I don't know that there's been a time where I have seen him that he didn't complain of pain that was pretty much head to toe.

Q. But your records spell out that he came in and, with increasing complaints in the left shoulder?

A. Yes.

Q. I guess the question is, if he is starting to develop increased symptoms and even increased symptoms without any changes comparing the July [x-ray] to the November [x-ray] from 2014, how is it that you are able to attribute any worsening in that condition to an automobile accident that occurred 18 years ago?

A. He has not done something new. Certainly you have traumatic arthritis that happens from injuries Traumatic arthritis from old injuries is common.⁷

⁵ Parris Depo. (Jan. 15, 2015) at 14.

⁶ *Id.* at 10 and 15.

⁷ *Id.* at 18-20.

In the April 7, 2015 Post-Award Medical Award, the judge stated, in part:

. . . A review of the many hearings in this case revealed the claimant having complaints of left upper extremity numbness associated with a cervical spine injury and a fracture of the left index finger from the accident, but no mention by the claimant or in physicians' medical records of physical complaints or injuries involving the left upper arm or shoulder.

The claimant's testimony at the present hearing, that he fractured his humerus in the work accident and has had pain in the left arm ever since, was contradicted by his prior testimony and by medical records. On that basis, his testimony was not considered credible. Yet, there is an old left humerus fracture shown on the claimant's x-ray. Something caused it.

The claimant was hit by a car at highway speed. The accident was violent enough to injure both of the claimant's lower extremities, fracture his right humerus, and injure his right shoulder, low back, and later, as a natural consequence of the other injuries, his cervical spine. The accident was violent enough to have caused a left humerus fracture, and the left index finger fracture showed the claimant's left upper extremity was affected by the accident. It is also highly unlikely a fracture of the upper extremity's large bone would go unmentioned by physicians and the claimant for eighteen years, especially when the injuries were previously detailed down to a broken finger.

The April 13, 2000 settlement hearing in this case included an August 18, 1998 rating report from Dr. Prostin. The report noted the claimant's report of a bicycling injury prior to the 1996 work accident which caused a head injury, splenectomy, and left wrist fracture. A bicycling accident violent enough to break bone in the claimant's left arm and rupture his spleen would have also been violent enough to fracture his left humerus.

Did the claimant and his physicians simply overlook, until 2014, a left humerus fracture that occurred in 1996? Did the claimant fracture his left humerus in the bicycle accident and misremember it as a wrist fracture? The record provided no definite answer, but, in the court's opinion, failed to establish by a preponderance of credible evidence the left humerus fracture, and resulting traumatic left shoulder arthritis, arose from the 1996 work accident.

For this reason, the claimant's request for post-award medical treatment of the left shoulder is denied.⁸

Thereafter, claimant filed a timely appeal.

⁸ Judge's Award (Apr. 7, 2015) at 2-3.

PRINCIPLES OF LAW

An employer is liable to pay an employee compensation where the employee sustains personal injury by accident arising out of and in the course of employment.⁹

K.S.A. 1996 Supp. 44-510(a) states in pertinent part:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The parties proceeded in this case under the procedure allowed in K.S.A. 44-510k, enacted in 2000, which states after an award is entered, the judge can award further medical care if it is “necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.”

“When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.”¹⁰

“Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.”¹¹ A claimant's testimony alone is sufficient evidence of his or her physical condition,¹² but the determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.¹³ The trier of fact must decide which testimony is more accurate and/or credible and adjust the medical testimony with the testimony of claimant and any other testimony relevant to the nature and extent of injury and disability. The trier of fact is not bound by the medical evidence presented.¹⁴

⁹ K.S.A. 1996 Supp. 44-501.

¹⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007); see also *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹¹ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

¹² *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

¹⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Board review of a judge's order is de novo on the record.¹⁵ Appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.¹⁶ The Board often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.¹⁷

ANALYSIS

Claimant did not prove he injured his left upper arm or his left shoulder as a result of his 1996 accident or as the direct and natural result thereof. Therefore, the Board affirms the judge's denial of the medical treatment he seeks.

Claimant did not present sufficient evidence to prove he fractured his left humerus or injured his left shoulder as a result of his 1996 accident or as a direct and natural result of the 1996 accidental injury. Claimant's need for medical treatment is not necessary to cure and/or relieve the effects of the 1996 injury because his left upper arm and left shoulder injuries were not involved either in the 1996 injury or as a direct and natural result thereof. We affirm the judge's denial of the MRI and/or referral to an orthopedic physician.

If claimant had fractured his left humerus or injured his left shoulder in his 1996 accident, like the judge, we would expect the evidentiary record to sufficiently support such assertion. Claimant asserted a right humerus fracture when he filed his application for hearing, but he did not assert a left humerus fracture or a left shoulder injury. Approximately 21 months post-accident, Dr. Prostic – claimant's retained medical expert – noted claimant had sustained, among other injuries, a right humerus fracture, but Dr. Prostic mentioned nothing about a left humerus fracture or a left shoulder injury.

The evidence does not contain records contemporaneous with claimant's accident showing a left shoulder or left upper arm injury. Indeed, the credible evidence first shows claimant having some left shoulder, trapezius, scapular or latissimus dorsi complaints in 2006. Dr. Prostic attributed such complaints to claimant's cervical spine. These complaints do not appear in the evidentiary record prior to 2006 and there is very little credible testimony or documentary evidence suggesting such complaints continued thereafter. Claimant also had subjective bilateral upper arm paresthesias in 2010 which may have been emanating from his neck. Both the 2006 and 2010 complaints appear different than claimant's left upper arm and left shoulder complaints first noted in 2014.

¹⁵ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹⁶ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

¹⁷ It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

There is insufficient credible medical evidence establishing claimant's current left upper arm and/or left shoulder complaints are the direct and natural result of his 1996 accidental injury. Claimant recently testified he used his left shoulder more to compensate after his right shoulder injury, but such testimony is not found elsewhere in the extended record. The judge specifically found claimant's testimony not credible and contradicted by his prior testimony and medical records.

While it is true Dr. Parris gave claimant a favorable opinion regarding claimant's current symptoms and need for treatment being the direct and natural result of the 1996 accidental injury, such opinion is solely based on Dr. Parris believing claimant's statement to him that he injured his left shoulder in the original accident. Thus, Dr. Parris' opinion rests on a false assumption. Nothing else supports claimant's statement, such as documentation of a left upper arm or left shoulder injury in 1996. Dr. Parris did not know if there was any such documentation. The absence of such prior records and testimony controverts the testimony of both claimant and Dr. Parris. The Board agrees with the judge – had claimant fractured his left humerus in 1996, it would be highly unlikely for claimant and his physicians to have overlooked it.

As noted by Dr. Wheeler, claimant had documentation in 2006 of a healed left humerus fracture. However, simply because claimant has proof of a bodily defect does not mean such injury was due to his 1996 accident. Before Dr. Parris' 2015 testimony, no doctor linked claimant's left upper arm or left shoulder injury to his 1996 accident. We find Dr. Parris' testimony to be against the weight of the credible evidence.

The judge's decision contains some commentary about claimant's bicycling accident. The Board does not agree with claimant's argument that the judge speculated to find the cause of claimant's left humerus fracture. The judge stated the record did not reflect the cause of claimant's left humerus fracture and claimant did not meet his burden of proving it was due to the 1996 accident.

CONCLUSIONS

Claimant failed to prove his left humerus fracture and left shoulder injuries were due to his 1996 accident or were the direct and natural result thereof.

AWARD

WHEREFORE, the Board affirms the April 7, 2015 Post-Award Medical Award.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

ec: William Phalen, Attorney for Claimant
wlp@wlphalen.com

Ryan Weltz, Attorney for Respondent
rweltz@wsabe.com

Honorable Kenneth J. Hursh